IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN HOSPITAL ASSOCIATION, *et al.*, Plaintiffs, v. SYLVIA MATHEWS BURWELL, Defendant.	Civil Action No. 14-CV-851-JEB

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANT'S CROSS-MOTION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

STATUTES:

REGULATIONS:

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

INTRODUCTION

The Secretary yet again criticizes Plaintiffs' menu of proposed solutions without offering her own plan to bring the Department of Health and Human Services (HHS) into compliance with the mandatory deadlines in the Medicare statute. Plaintiffs have proposed a slate of three substantive reforms for reducing the backlog. *See* Pls.' Mot. for Summ. J. 4-12 (Oct. 14, 2016), ECF No. 39 (Mot.). If the Secretary or this Court is unsatisfied with those specific reforms, Plaintiffs have also proposed a set of meaningful yet attainable numerical targets for eliminating the backlog over the next four years. *Id.* at 12-13. Either option would provide much-needed relief to hospitals suffering from HHS's clear statutory violations. The Secretary's proposed alternative—that this Court order HHS to maintain the status quo—ignores the severity of the problem and the clarity of the statute. *See* Def.'s Mot. for Summ. J. & Opp'n to Pls.' Mot. for Summ. J. 9 (Nov. 7, 2016), ECF No. 42 (Opp'n).

In addition to resisting any action-forcing mandamus order, the Secretary contends once more that mandamus is inappropriate altogether. *Id.* at 5-7. This marks the fourth iteration of the Secretary's same basic argument: a round of briefing in this Court, a round of briefing in the Court of Appeals, a round of briefing on a substantive motion to stay, and the current round of briefing. Although the Secretary points to partial settlements and other efforts, she does not identify any new administrative actions sufficient to resolve the backlog over time. Indeed, her resistance to a court-ordered timeline for reducing the backlog underscores that she does not expect her current administrative proposals to suffice. It thus remains as true now as it was two months ago that "[t]he balance of interests drives the conclusion that there are equitable grounds for mandamus." Mem. Op. 16 (Sept. 19, 2016), ECF No. 38.

ARGUMENT

I. The Court's Mandamus Order Should Compel Specific Reforms Or Specific Reductions Of The Backlog.

The sole new issue in this briefing cycle is what form the Court's mandamus order should take. Plaintiffs have proposed qualitative and quantitative options. The Secretary opposes both. Instead, the Secretary suggests that, for various reasons, *any* Court-ordered solution would be improper. None of her overarching objections has merit.

First, the Secretary asserts that she cannot be ordered to undertake any specific measures that fall within her discretion. *See* Opp'n 9 n.4. She repeats the same assertion in response to individual policy proposals, as well. *See id.* at 12 ("the power to settle pending claims is an inherently Executive function"); *id.* at 19 ("there is no basis on which the Court could direct the Secretary to exercise [her] discretion" to initiate a demonstration project or model). But that argument misunderstands the nature of a mandamus order in this case. Plaintiffs have not sought mandamus based on HHS's failure to settle certain claims, or failure to initiate a certain demonstration project, or failure to adopt any other discretionary policy. As previously explained, "the basis for any grant of mandamus is the Secretary's *failure to comply with clear statutory deadlines*." Mot. 11 (emphasis added); *see also Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 191 (D.C. Cir. 2016) (explaining that Plaintiffs "simply seek[] to compel the Secretary to make decisions within the statutory time frames"). This Court *could* order the Secretary to comply with those non-discretionary statutory deadlines, full stop. When she inevitably fails to clear the backlog in 90 days, she may be held in contempt or risk default judgments on hundreds of thousands of appeals. Or this Court could order the relief that Plaintiffs have proposed here, including action in areas that would otherwise fall within the Secretary's discretion, to avoid that

result—an equitable approach that the Secretary undoubtedly would prefer to a "comply, full stop" command.

Second, the Secretary contends that she should receive some sort of deference to prioritize general agency objectives over the specific statutory deadlines that Congress has set. *See* Opp'n 8. She made a similar argument to the Court of Appeals, insisting that Plaintiffs' "request constitutes a 'programmatic attack' on the way her department manages its resources." *Am. Hosp. Ass'n*, 812 F.3d at 191. The authorities the Secretary cites, however, involve discrete instances of statutory ambiguity, not perceived tradeoffs between the general duty to implement a government program effectively and specific statutory rules for that program. *See, e.g.*, *Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191 (2014) (assessing whether the statute commanded that a particular class of beneficiaries should receive an immigration preference). Were it otherwise, an agency could always recast conflicting priorities as conflicting statutory mandates and thereby shield itself from mandamus. The law says otherwise. *See In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545, 554 (D.C. Cir. 1999) ("However many priorities the agency may have, and however modest its personnel and budgetary resources may be, there is a limit to how long it may use these justifications to excuse inaction in the face of the congressional command to act."). The law of this case does, too. *See Am. Hosp. Ass'n*, 812 F.3d at 193 ("[C]ongressionally imposed mandates and prohibitions trump discretionary decisions.").

Third, the Secretary complains that this Court may not use its mandamus authority "to order relief that is not even designed to resolve the alleged statutory violation." Opp'n 11. Plaintiffs agree. There can be no question that numerical targets paired with default judgments will be effective: They are self-enforcing. And for the reasons discussed below, Plaintiffs' specific policy proposals will also be effective in reducing the backlog and minimizing its sting.

A. Plaintiffs' Substantive Proposals Are Legal And Reasonable.

Plaintiffs first proposed that the Court order the Secretary to (1) offer broad settlements, (2) delay repayment and the accrual of interest, and (3) implement reforms to the Recovery Audit Contractor (RAC) program. That trio of actions will reduce the current backlog, mitigate the severe financial effects of HHS's statutory violations, and slow the pace of future appeals. The Secretary complains that these actions are contrary to statute and counterproductive, but she is wrong.

1. Settlement

Plaintiffs and the Secretary appear to agree that meaningful settlements represent a critical step in reducing the existing backlog. *See* Mot. 4-5; Opp'n 10. Plaintiffs argued that the Secretary should be ordered to offer reasonable settlements that are as broad as practicable. Mot. 4-5. If the Secretary believes instead that settlements could be offered on the basis of a "particular provider's or supplier's historic success rate" or "a sampling and extrapolation of the provider's or supplier's pending appeals," Opp'n 10, that may be one step forward. Plaintiffs continue to believe that settlement offers extended to large groups of providers—such as inpatient rehabilitation facilities, which have large sums of money tied up by HHS's administrative delays—are a more straightforward, efficient, and transparent opportunity for significant numbers of providers to resolve their overdue appeals. But to the extent that the Secretary can divide providers into smaller groups, while still making reasonable and immediate progress, Plaintiffs have no blanket objection to that approach. The adequacy of an

individualized, extrapolation-based approach will turn on the specifics of the Secretary's methodology[1] and the speed of its implementation.

The critical point is that settlements must be offered on a large enough scale to materially decrease the backlog in the short term, meaning that the Secretary's focus on a "particular provider[]" cannot simply be code for a lengthy and resource-intensive negotiation in each individual case. That is why Plaintiffs proposed that the Secretary could extend different settlement offers to different subgroups of providers based on their material similarities, or could extend a global 68% settlement offer to all Medicare Part A claimants. *See* Mot. 5. The Secretary maintains that pursuing broad settlements would create incentives for providers to appeal every denied claim, even those claims without merit. Opp'n 11. But Plaintiffs have never suggested that all settlements must apply prospectively. To assuage her concerns, the Secretary might confine a settlement offer to those providers with claims already filed or pending before an administrative law judge (ALJ), or claims that have been pending longer than the 90-day statutory deadline. Meanwhile, her separate concern that providers will settle their least meritorious claims, *see id.*, is a risk inherent in all settlements. It could also be mitigated by requiring providers to settle complete batches of pending claims, absent further provider-specific negotiations.

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[1] For example, Plaintiffs question why a provider's success rate would be calculated based, in part, on *all* dismissals. *See* Suppl. Decl. of Ellen Murray ¶ 39 (Nov. 7, 2016), ECF No. 42-1 (Murray Suppl. Decl.). Incorporating all dismissals artificially reduces providers' success rates because the denominator encompasses dismissals unrelated to the merits—including when providers withdraw their appeal out of frustration with the Secretary's delays. And the suggestion that a provider would be required to settle all *future* appeals at the same rate (even if, for example, new RAC contracts encourage a higher rate of meritless denials) would improperly saddle providers with mandatory adjudication-by-formula. *See id.* ¶ 40. It would also contravene the Medicare statute and the Secretary's own regulations. *See* 42 U.S.C. § 1395ff(d)(1)(A); 42 C.F.R. §§ 405.1002, 405.1032, 405.1036.

Most importantly, the Secretary cannot do what her briefing occasionally suggests: throw up her hands and state that she has already settled all of the claims "that she can responsibly settle on the same terms." Opp'n 12. There is more work to be done. The Secretary's good-faith efforts to settle claims on a group basis can be a critical component of reducing the present backlog and forestalling the need for more drastic remedies for the ongoing statutory violations.

2. Delayed Repayment and Interest Tolling

Plaintiffs next proposed that the Secretary defer repayment of disputed claims and toll the accrual of interest while an appeal is pending *beyond the statutory maximum period of time* for any level of administrative review. Mot. 5-9. The Secretary's primary objection is that such tolling will not alleviate the backlog. Opp'n 13. That is true, as far as it goes; tolling alone will not *itself* reduce the backlog. But mandamus is an equitable remedy, and the Court should provide interim relief from the most severe effects of statutory violations, at least where statutory compliance is not forthcoming.[2] In addition, as Plaintiffs explained, *see* Mot. 9, and as the Secretary's own concerns about fiscal consequences confirm, *see* Opp'n 13, shifting the financial burdens of delay from providers to HHS would necessarily heighten HHS's sense of urgency. And because interest would be tolled only for those periods of time beyond the statutory deadlines, there would be no new incentives to bring appeals apart from the incentives that would exist in a functioning, compliant system. *See id.*

The Secretary further argues that any deferred-repayment plan lies outside her authority. This Court cannot, of course, require action that the Medicare statute prohibits. But the relief

[2] The Secretary argues that "the Medicare statute and the Secretary's regulations already provide a remedy for financial hardship posed by recoupment." Opp'n 13-14. But the relevant statute and regulation narrowly define "hardship" to mean a recouped payment that exceeds 10% of a provider's aggregate Medicare payments. *See* 42 U.S.C. § 1395ddd(f)(1)(B); 42 C.F.R. § 401.607(c)(2)(i). They also put the onus on providers to apply for such relief, and give HHS the authority to reject the request. *See* Murray Suppl. Decl. ¶ 34; 42 C.F.R. § 401.607(c)(3).

requested here falls comfortably within the scope of the Secretary's authority. For starters, the statutory rules for interest accrual contemplate that interest will accrue only so long as the statutory deadlines permit—meaning approximately one year.[3] *See* Mot. 7-8. HHS has accordingly tolled interest for itself during *claimant-induced* delays. *See id.* & 8 n.3. If the statute permits such tolling, there is no reason why the same tolling should not apply during *agency-induced* delays. The Secretary's attempt to distinguish the rules for the interest that she pays from the rules for the interest that providers pay has no basis in the statute: The Secretary is required to pay the same interest rate as providers "for the period in which the amount was recouped." 42 U.S.C. § 1395ddd(f)(2)(B). The Medicare statute thus imposes complementary interest rules on providers and the Secretary over defined periods of time; exceptions based on the other party's delays should apply in both directions.

As Plaintiffs also explained, generally applicable statutes like the Federal Claims Collection Act (FCCA) are irrelevant. *See* Mot. 8-9. The FCCA and its regulations require that an agency "try to collect" its debts and do so "aggressively." *See* 31 U.S.C. § 3711(a); 31 C.F.R. § 901.1(a). That is all. There is no authority for the Secretary's bald claim that HHS's collection actions are not sufficiently "aggressive[]" if HHS delays collection while (1) a purported overpayment is being appealed, and (2) HHS itself has caused severe delays in the appeal. The FCCA's hortatory language about the prompt collection of debts simply does not address that scenario. The same goes for the Secretary's duties under the Medicare statute. Her general

[3] As the Court of Appeals explained, the statutory time periods generally add up to "about a year." *Am. Hosp. Ass'n*, 812 F.3d at 186. The Court of Appeals' assumption, like Plaintiffs', is that providers that are struggling with HHS's massive delays would not use the full available time to appeal at each level. Only by assuming that providers wait an aggregate of 420 days to file their requests for further review—which is contrary to providers' interests—can the Secretary claim that the entire process is closer to two years than one. *See* Murray Suppl. Decl. ¶ 43. The key fact is that HHS has a total of just 300 days to make decisions at all four levels of review. *See id.*

obligation to combat fraud and pursue Medicare overpayments, *see* Opp'n 16-17, does not bear on the narrow question of whether she can toll interest accrual during her unilateral delays.

Finally, even if there were a generic statutory bar on tolling the accrual of interest—and there is not—the Secretary's demonstration and modeling authorities remain available. *See* Mot. 6-7. Those authorities afford the Secretary substantial flexibility to "improve[] methods for the investigation and prosecution of fraud"; enact "changes in methods or payment" that "increas[e] the efficiency and economy of health services"; or "test innovative payment and service delivery models to reduce program expenditures." 42 U.S.C. § 1395b-1(a)(1)(J); *id.* § 1395b-1(a)(1)(A); *id.* § 1315a(a)(1). The Secretary protests that recoupment and interest reform would not create incentives for economy or otherwise "improve the post-payment review process." Opp'n 18. The former is not necessarily true; the Secretary could justify delays based on minimizing undue interest payments by HHS or avoiding expensive and time-consuming litigation. And the latter is certainly not true; mitigating HHS's own illegal delays is a simple way to improve the post-payment review process for providers and to improve health outcomes for those providers' constituencies. *See* Mot. 6. That the Secretary may not *want* to use this authority does not mean that she *cannot*.

3. RAC Reforms

Plaintiffs also highlighted the need to reform the RACs' financial incentives. Mot. 9-11. Real reform is urgently needed to prevent the backlog from ballooning further now that new RAC contracts have been negotiated. *See* Murray Suppl. Decl. ¶ 18 (stating that the contracts took effect on October 31, 2016). The Secretary argues that she has already taken steps to rein in the RACs' abusive practices, noting that the percentage of RAC-related appeals has dropped sharply since fiscal year 2014. Opp'n 3. As Plaintiffs have noted, however, HHS recently

reported that "it expects the number of incoming appeals to increase again when new [RAC] contracts are awarded and the [RAC] program resumes full operation." U.S. Gov't Accountability Office, *Medicare Fee-for-Service: Opportunities Remain to Improve Appeals Process* 38 (May 2016). In contrast with the Secretary's sanguine predictions, *see* Opp'n 3, Plaintiffs have little confidence that removing patient status claims will change RACs' practices. Because RACs remain paid on a "contingent basis for collecting overpayments," and because the Secretary has not reduced their contingency fee based on error rates, RACs' incentive is to follow the money and shift to denying other types of hospital claims. 42 U.S.C. § 1395ddd(h)(1)(B)(i). Separately, the Secretary points to a modification to the RAC contracts that she expects to result in 26,000 fewer appeals over five years. *See* Opp'n 4. That change is indeed a positive step. It is also a very small one.

Plaintiffs agree with the Secretary that shortening the RAC look-back period would represent another small-but-positive step. *See id.* at 10, 22. A one-year look-back period could reduce the total volume of claims, though the impact might be marginal. At a minimum, though, it might have the beneficial effect of increasing financial predictability for providers, especially those hospitals suffering from cash flow problems. Plaintiffs would support the change.

Still, the most effective solution would be to penalize RACs for poor performance. The Medicare Payment Advisory Commission, Congress's independent Medicare advisory body, agrees. It has recommended that the Secretary "modify each RAC's contingency fees to be based, in part, on its claim denial overturn rate." Medicare Payment Advisory Comm'n, *Report to Congress: Medicare and the Health Care Delivery System* 172, 180-183, 195 (June 2015) ("RACs currently face no penalties when claim denials are overturned on appeal."). As one example, Plaintiffs proposed "a tiered fee schedule under which RACs receive a diminishing

contingency fee percentage when their total error rate at the ALJ level increases." Mot. 11. The Secretary appears to resist this contractual change, equating it with an unenforceable liquidated damages provision. Opp'n 20-21. It is not clear why. RACs' poor performance does not amount to a breach of contract, and a penalty need not involve a formal fine. In fact, the Secretary concedes that she may "*disincentivize* poor performance through contractual provisions" and "tie . . . incentives to contractor performance, either positive *or negative*." Opp'n 21 (emphases added) (citing 48 C.F.R. § 16.402-2(a)-(b)). Whether we call it "penalizing" or "disincentivizing," that is precisely Plaintiffs' point. Negative performance incentives—like a reduction in contingency fee percentages—are needed to motivate RACs to audit claims accurately, without a thumb on the scale in favor of denying a claim. Positive incentives have been ineffective in that respect.

The other critical component of RAC reform is that the accuracy of claims must be evaluated at the ALJ level. In the latest year reported, the reversal rate for Part A appeals was more than five times higher at the ALJ level than at the first level of review. *See* Mot. 10. The Secretary offers new statistics suggesting that reversal rates at the early levels have jumped to more than 50%. Murray Suppl. Decl. ¶ 25. It is not clear what categories of appeals the Secretary's statistics include (and the statistics seem irreconcilable with the Secretary's simultaneous assertion that the RACs boast high accuracy rates of more than 90%, *see id.* ¶ 24), but an increase in RAC reversals is cause for *more* concern, not *less*. In any event, regardless of whether the early levels of review are fairly called "rubber stamps," the ALJ level is the first point at which there is an independent decision-maker. *See* Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 931(b)(2), 117 Stat. 2066,

2398 ("The Secretary shall assure the independence of administrative law judges."). It is therefore the appropriate level of review by which to measure the RACs' performance.

B. Reduction Targets Offer An Alternative, Flexible Approach.

The Court could alternatively conclude that, rather than require the Secretary to adopt certain reforms, it will impose strict temporal and numerical deadlines on HHS's progress: a 30% reduction by the end of 2017, a 60% reduction by the end of 2018, a 90% reduction by the end of 2019, and elimination of the backlog by the end of 2020. *See* Mot. 12. Rather than requiring the Secretary to act within 90 days, as the Medicare statute does, such an order would provide up to *four years* for HHS to come into full compliance.

The Secretary does not argue that those deadlines would be impossible to meet. Instead, she objects that "[s]uch an order would require the Secretary to make Medicare payments based on calendar deadlines rather than proper claim substantiation." Opp'n 22. That is a remarkable statement. It is, after all, the *statute itself* that sets "calendar deadlines"; the Secretary cannot credibly claim that an order enforcing those deadlines somehow contravenes the statute.

In addition, the Court should enforce any reduction targets by imposing default judgments if necessary. *See Bristol Petroleum Corp. v. Harris*, 901 F.2d 165, 167 (D.C. Cir. 1990) ("Authority to dismiss and other sanctions have been entrusted to the district courts to enable district judges to discharge efficiently their front-line responsibility for operating the judicial system."). The possibility of such an enforcement mechanism will not create incentives for providers to file meritless appeals, *see* Opp'n 23, because this Court should assume that the Secretary will *meet* the deadlines it sets, not flout them. The only thing that could "endanger the Medicare Trust Funds," then, would be the Secretary's own choice not to act. *Id.*

To monitor those mandatory reductions, the Court should order status reports. *See* Mot. 13. If the Secretary believes that 90-day reports rather than 60-day reports better align with her priorities and her data-tracking systems, Plaintiffs are willing to accept status reports every 90 days, but retain the right to seek more frequent status reports in the event it appears that the Secretary is not on target to meet the required reductions by the yearly deadlines set forth above. *See* Opp'n 23.

C. The Secretary's Preferred Order Is No Solution At All.

In contrast with the two approaches outlined above, the Secretary proposes a mandamus order that amounts to a thumbs-up. Opp'n 9. In half of the order, the Secretary would be instructed to continue the new RAC contracts and continue the administrative measures she described in May. *Id.* But as this Court already has observed, that would, at most, slow the pace of the backlog's growth, not reduce it. *See* Mem. Op. 13 (explaining that if the administrative reforms were "implemented according to plan, the OMHA backlog will still grow every year") (emphasis in original). In the other half, the Secretary would be instructed to carry out her existing settlement plans. Although the settlements in progress may remove a portion of the backlog, *see* Murray Suppl. Decl. ¶ 12, they will come nowhere near to eliminating it altogether. In particular, HHS expects the reopened settlement to eliminate only 95,000 appeals, *id.*, and the expanded settlement conferences to eliminate a mere 5,000 appeals per year, *id.* Ex. 2. The Secretary cannot stop at the reforms she has already proposed, and the Court should not issue a "just keep doing what you are doing" order that will never result in statutory compliance.

II. The Secretary's Last-Ditch Efforts To Avoid Mandamus Should Be Rejected.

The Secretary resists not just the form of a mandamus order but—for the fourth time—that mandamus should issue at all. This Court has already rejected her arguments. Any new

developments do not represent the sort of dramatic change that might counsel in favor of revisiting the Court's September 19 decision.

The Secretary's primary argument against mandamus is that the backlog is now "finally decreasing." Opp'n 1; *see also id.* at 6 (stating that the backlog has "begun to improve"); *id.* (stating that the backlog is "improving considerably"). The situation is not so rosy. The reported reduction in the number of pending appeals is largely the product of a particular hospital appeals settlement. *See* Murray Suppl. Decl. ¶ 12. While Plaintiffs commend the Secretary for that action, she has ominously stated that the settlement "is based on a unique set of circumstances that does not apply to other appeals in the backlog." *Id.* ¶ 13. Put differently: Hospitals should not expect the Secretary to expand her settlement efforts unless this Court instructs her to do so.

The Secretary's updated statistics bear that out. The anticipated impact of all administrative actions is concentrated over fiscal years 2016 and 2017, with the bulk of the impact coming from the "unique" hospital settlement. *See id.* Ex. 2. Accounting for HHS's administrative actions alone, the backlog will never dip below 560,000; and it will shoot back upward to nearly 900,000 appeals by 2021. *Id.* That is not the "significant progress toward a solution" that the Court of Appeals and this Court have demanded. *See Am. Hosp. Ass'n*, 812 F.3d at 193; Mem. Op. 13. Moreover, the fact that the Secretary so vigorously resists a four-year deadline for attaining compliance, *see* Opp'n 22-23, underscores that even she does not expect her current administrative actions to lead to "significant progress."[4]

The bottom line, then, is that the Secretary is still placing her faith in legislative intervention. *See id.* at 2 (relying on a "combination of administrative and legislative

[4] The Secretary's other arguments about the factors weighing for and against mandamus, *see* Opp'n 6-7, have already been briefed to and assessed by this Court. *See* Mem. Op. 16 (concluding that "[t]he balance of interests drives the conclusion that there are equitable grounds for mandamus").

measures"); *id.* at 6 (stating that administrative reforms "with legislative action" will eliminate the backlog by fiscal year 2019); *id.* (projecting that the backlog will decrease "with legislative action"). The same was true in September. As this Court explained then, Congress's failure to increase the appeals budget or to move forward on the AFIRM Act, notwithstanding its "ample knowledge of the backlog," means that "Congress is unlikely to play the role of the cavalry here, riding to the rescue of the Secretary's besieged program." Mem. Op. 15-16. After a contentious election, there is no reason to be optimistic that the 115th Congress will be any different. Of course, if the political branches were to surprise everyone, intervene, *and* pass legislation markedly improving the backlog, the Secretary could move to dissolve the mandamus order.

In light of the Secretary's own projections of a 900,000-appeal backlog by 2021, Plaintiffs have no assurance that their appeals will ever be heard in compliance with the statutory deadlines (or anywhere in the ballpark of those deadlines), absent this Court's intervention. Nor should Plaintiffs be forced to wait any longer for the Secretary to propose further incremental reforms. This suit was filed 30 months ago—ten times the allotted period for an ALJ decision. 42 U.S.C. § 1395ff(d)(1)(A). If the Secretary plans to "work[] on more" reforms, Opp'n 1, then the Court's mandamus order and imposition of deadlines for reductions should cause no alarm. The order will give the Secretary the flexibility to explore her options and will give Plaintiffs the assurance that their statutory rights will not be flouted indefinitely. And if the Secretary plans to do nothing more, then the Court's mandamus order is critical to protect Plaintiffs' rights.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment, that the Court deny the Secretary's cross-motion for summary judgment, and that mandamus issue.

Respectfully submitted,

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Dated: November 15, 2016

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system.

/s/ Catherine E. Stetson
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